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Supreme Court, U.S.
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No. 03-51

IN THE

Supreme Court of the United States

SEAN SILVEIRA, *et als.*,
Petitioner,

v.

BILL LOCKYER, ATTORNEY GENERAL, AND
GRAY DAVIS, GOVERNOR, STATE OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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22 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the Second and Fourteenth Amendments to the United States Constitution protect the right of individual persons to keep and bear arms for their personal protection and the protection of their loved ones as well as their nation

LIST OF ALL PARTIES TO THE PROCEEDING

a. The plaintiff/petitioner: Sean Silveira, Jack Safford, Patrick Overstreet, David K. Mehl, Steven Focht, David Blalock, Marcus Davis, Vance Boyces, and Ken Dewald, who are represented by Gary W. Gorski, 5033 Blanchard Court, Fair Oaks, California, 95628.

b. The defendant/respondent: the State of California, which is represented by Tim Rieger, Deputy Attorney General, State of California Justice Department, P.O. Box 160487, Sacramento, CA, 95816.

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AMICUS BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

Pink Pistols is an unincorporated association established in 2000 to advocate for the interests of gay, lesbian, bisexual, and transgendered (hereinafter GLBT) firearms owners, with specific emphasis on self-defense issues.[1] The parties consented to the filing of this amicus petition by stipulation dated July 9, 2003. There are 37 chapters in 28 states. Membership is open to anyone who supports the rights of GLBT firearms owners regardless of their sexuality.

Pink Pistols is keenly aware of the long history of hate crimes and violence directed at this community, and of police harassment of, and indifference to, this community. Indeed,

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[1] This brief was not written, in whole or in part, by counsel for any party. The fees and costs for this brief are being paid by Pink Pistols members via donations. *See* Rule 37.6.

the genesis of the modern gay rights movement involved resistance to police harassment of patrons of a gay bar—The Stonewall Inn in New York City—in 1969. *See* Faderman, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA 194-95 (1992). The GLBT community thus has historical reason to expect that police will not diligently protect its members from hate crimes.

The right to carry firearms for self-defense has particular relevance for its members because GLBT persons are frequent victims of hate crimes. FBI, UNIFORM CRIME REPORTS (2001) at 59-60 (14.3% of hate crimes reported to FBI in 2001 based on sexual orientation).

Hate crimes based on sexual orientation are the most violent bias crimes. Swigonski, Mama, Ward, Eds., FROM HATE CRIMES TO HUMAN RIGHTS (2001) at 2. Members of hate groups, almost without exception, attack in groups, and target single victims. Schafer & Navarro, *The Seven-Stage Hate Model: The Psychopathology of Hate Groups*, 72:3 FBI L. ENFORCEMENT BULL. 1, 4 (March, 2003). This means that a lone unarmed member of Pink Pistols is unlikely to escape an attack by a hate group without serious injury.

Many bias attacks involve broken bottles, baseball bats, blunt objects, screwdrivers, and belt buckles. *Id.* at 4-5. Firearms are less common because they do not allow the hate group to express their violence personally. *Id.* at 5. A Pink Pistols member who is lawfully carrying a firearm may be able to prevent an attack by displaying and using the firearm, if necessary, in compliance with local self-defense law.

It is vital for members of the GLBT community to be able to lawfully defend themselves against would-be "gay bashers". The opinion of the Court of Appeals for the Ninth Circuit challenged in this case places at risk an individual's

right to possess a firearm for self-defense, and thus places the very lives of Pink Pistols' members at risk.

Pink Pistols therefore urges this Court to take up this important issue and to confirm that the Constitution of the United States protects an individual right to keep and bear arms.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Ninth Circuit's conclusion that the Second Amendment does not confer an individual right to own or possess arms is erroneous. A review of state constitutional analogs to the Second Amendment shows that the Second Amendment encompasses an individual right of individual citizens to possess arms to protect themselves, their families, and their nation. A link between the Second Amendment and the historical militia and modern military would allow states, overtly or sub rosa, to legally disenfranchise women (who were historically not part of the militia and are currently excluded from front-line ground combat) and homosexuals and bisexuals (who are excluded from modern military service). The Court's conclusion allows states to disenfranchise all citizens from firearms ownership, thus leaving Pink Pistols members unable to defend themselves.

ARGUMENT

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRONEOUSLY CONCLUDED THAT THE SECOND AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT PROTECT AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS FOR THE PROTECTION OF ONE'S PERSON, FAMILY, AND NATION.

Silveira v. Lockyer, 312 F.3d 1052, 1056 (9th Cir. 2003) holds that "[b]ecause the Second Amendment does not confer

an individual right to own or possess arms, we affirm the dismissal of all claims brought pursuant to that constitutional provision." Here, the petitioners lawfully owned certain firearms until a 1999 amendment to the California Assault Weapons Control Act ("the AWCA") CAL. PENAL CODE § 12275 et seq. *Silveira*, supra, at 1059. The 1999 Amendment required them to "register, relinquish, or render inoperable" these firearms. *Id.*

The *Silveira* decision conflicts with the opinion of the Court of Appeals for the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002). It also conflicts with the essential guarantee of the Second Amendment to ensure the right to keep and bear arms for personal protection.

A. The Right to Keep and Bear Arms for Personal Protection is Enshrined in Many State Constitutions.

Among the earliest state constitutions was the Declaration of Rights to the Massachusetts Constitution, which provides that "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." MASS. CONST. Art. I, § 1 (1780). It also states that "The people have a right to keep and to bear arms for the common defence." MASS. CONST. Art. I, § 17 (1780) [2].

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[2] Nearly two centuries later, Massachusetts interpreted § 17 in a manner similar to the *Silveria* court to deny an individual right to keep and bear arms based upon its reference solely to "common defense". *Com. v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (1976). Detailed analysis of state constitutional interpretations are beyond the page limits of this *amicus* pleading.

The Mississippi Constitution of 1817 provides that "Every citizen has a right to bear arms in defense of himself and the state." MISS. CONST. Art. I, § 23 (1817). The same or similar language is found in CONN. CONST. Art. I, § 15; ALA. CONST. Art. I § 23; ARIZ. CONST. Art. II, § 26; IND. CONST. Art. I, § 32; KAN. BILL OF RIGHTS § 4; MICH. CONST. Art. I, § 6; N.H. CONST. Part I, Art. 2-a; OHIO CONST. Art. I, § 4; ORE. CONST. Art. I, § 27; PENN. CONST. Art. I, § 21; S.D. CONST. Art. 6, § 24; VT. CONST. Art I, § 16; WASH. CONST. Art. I, § 24; W. VA. CONST. Art. III, § 22; WYO. CONST. Art. I, § 24. *See also* DEL. CONST. Art. I, § 20 (1897); NEB. CONST. Art. I, § 1 (1875); NEV. CONST. Art. I, § 11 (1864).

In these clauses, the right to keep and bear arms is linked to a right to personal self-defense, in addition to an obligation to defend the state or the United States. *Silveira*'s analysis of the Second Amendment failed to consider this fundamental link between the right to keep and bear arms and the ability to defend one's self with a weapon.

Five state constitutions contain a "keep and bear arms" clause without the militia preamble found in the Second Amendment to the United States' constitution. *See* ARK. CONST. Art. II, § 5 (1874); FLA. CONST. Art I., § 21 (1838); GA. CONST. Art. I, § 6 (1861); ME. CONST. Art. I § 16 (1820); R.I. CONST. Art. I, § 22 (1843). Five other state constitutions contains identical language to the Second Amendment. ALASKA CONST. Art. I, § 19; HAW. CONST. Art. I. § 17; N.C. CONST. Art. I, § 30; S.C. CONST. Art. I, § 20; VA. CONST. Art. I, § 13. The militia clause cannot be designed solely to protect an 18th century right to state militias when the language was adopted by Alaska and Hawaii in the mid-20th century, long after the creation of a standing national army.

The California, Iowa, Maryland, Minnesota, New Jersey, New York, North Dakota, and Wisconsin state constitutions lack a "keep and bear arms" clause.

Thirteen state constitutions have been specifically written or amended to permit restrictions on the right to carry a firearm, particularly concealed firearms. *See* COLO. CONST. Art. II, § 13; IDAHO CONST. Art I., § 11; ILL. CONST. Art. I, § 22: KY. BILL OF RIGHTS §1: LA. CONST. Art. I, § 11; MO. CONST. Art. I, § 23; MONT. CONST. Art. II, § 12; N.M. CONST. Art. II, § 6; N.C. CONST. ART. I, § 30; OKLA. CONST. Art. II, § 26; TENN. CONST. Art. I, § 26; TEX. CONST. Art. I, § 23; UTAH CONST. Art. I, § 6. Absent such an amendment, the right of an individual to carry a concealed firearm is apparently included within the meaning of the right to "keep and bear arms" in those states.

The majority of state constitutions expressly adopt the "traditional individual rights" model for interpreting the right to keep and bear arms which holds that the right guarantees to individual private citizens a fundamental right to possess and use firearms, subject only to limited government regulation. The Court of Appeals for the Fifth Circuit adopted this view in *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001). *Id.* at 1060. Pink Pistols believes this view is most appropriate for interpreting the Second Amendment to the United States Constitution in order to protect the individual's right to keep and bear firearms for his or her personal protection, protection of the home and family, and protection of the state.

B. The "limited individual rights" Model Allows Legal Discrimination Against Those who Were not Traditionally Eligible for Military Service, such as Women, and Against Those who are not Currently Eligible for Military Service due to their Sexuality.

The *Silveira* court discusses, but does not adopt the second traditional view of the Second Amendment, the "limited individual rights" model, which holds that the Second Amendment guarantees a constitutional right to possess

firearms insofar as such possession bears a reasonable relationship to militia service. *Id.* at 1060. Pink Pistols urges this Court not to adopt this view in its analysis.

Silveira concludes that the term "militia" refers to "the entity ordinarily identified by that designation, the state—created and—organized military force".[3] *Silveira*, *supra*, at 1069. Those who openly engage in homosexual conduct are legally prohibited from military service. 10 U.S.C. § 654. *See e.g. Thomasson v. Perry*, 80 F.3d 915 (en banc), *cert. denied*, 519 US. 948 (1996). If the "militia" refers only to those adults who are eligible for military service, then many GLBT persons could legally be deprived of the right to carry a firearm. *See* 10 U.S.C. § 654(b)(2); *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980), cert. denied sub nom. *Beller v. Lehman*, 452 U.S. 905 (1981). *See Dred Scott v. Sanford*, 60 U.S. 393, 417 (1857) (black citizenship unthinkable as it would carry with it the right of black Americans "to keep and bear arms wherever they went"). It is unclear whether *Lawrence v. Texas*, __ U.S. __ (June 26, 2003), would prohibit states from overtly denying homosexuals and bisexuals the right to carry firearms based upon their sexual orientation if the denial were tied to this interpretation of the militia clause.

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[3] The *Silveira* court further notes that "[T]he prevailing understanding both before and at the time of the adoption of the Constitution was that a "militia" constituted a state military force to which the able-bodied male citizens of the various states might be called to service." *Silveira*, *supra*, at 1071; 10 U.S.C. § 311(a), (b) (defining the "unorganized militia"). If the right to keep and bear arms is limited to those the drafters of the Constitution would have considered members of the militia, women could legally be forbidden to carry firearms. But *see Nunn v. State*, 1 Ga. 243, 251 (1846) (Second Amendment applies to women as well as men).

C. The "collective rights" Model, Adopted by the *Silveira* Court, Facilitates Discrimination Against Gay, Lesbian, Bisexual, and Transgendered Persons, Potentially Placing Such Persons at the Mercy of Hate Crime Groups.

The "collective rights" model asserts that the Second Amendment guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons. *Silveira, supra,* at 1087. *See Nordyke v. King*, 319 F.3d 1185, 1192 n.4 (9th Cir. 2003).

The Ninth Circuit discussed this Court's decision in *United States v. Miller*, 307 U.S. 174, 178 (1939) in which this Court related the possession of a shotgun with a short barrel to "some reasonable relationship to the preservation or efficiency of a well regulated militia". *See Silveira, supra*, at 1061. The *Silveira* court also noted that *Miller* stated that "[w]ith the obvious purpose to assure the continuation and render possible the effectiveness of [state militias] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id*; quoted in *Silveira, supra*, at 1061. The *Silveira* court concluded *Miller* rejected the traditional individual rights view. *Silveira*, supra, at 1062. It also noted this Court's opinion in *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980) stating that "[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well-regulated militia.'" *Silveira*, supra, at 1061. With due respect to the Court, implicit in the Second Amendment is also a right to keep and bear arms for individual protection, protection of one's family and of one's community.

1. *If the Second Amendment is Limited to the Maintenance of a State Militia, then Pink Pistols Members can Lawfully be Deprived of a Legal Right to Carry a Firearm for Self-Defense.*

Silveira holds that "The [second] amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use." *Silveira*, *supra*, at 1066. It further concludes that "[t]he historical record makes it equally plain that the amendment was not adopted in order to afford rights to individuals with respect to private gun ownership or possession." *Id.* at 1087. Pink Pistols disagrees with this view of the historical record, for the reasons set forth in *United State v. Emerson*. Under *Silveira*, any state could outlaw personal possession of firearms, or indeed of all weapons, leaving law-abiding citizens helpless to defend themselves against violent attack. *See United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001) ("under this model, the Second Amendment poses no obstacle to the wholesale disarmament of the American people.")

The right to bear arms in self-defense is vital to those who live in high crime areas, who are elderly or infirm, or who are particular targets of crime because of their race, ethnicity, gender, religion, or sexuality. As noted above, the GLBT community is a frequent target of unlawful attacks.

Historically, GLBT persons have not been able to depend upon the police to protect them or to deter hate crimes against their community. Police raids on bars historically involved humiliating group strip-searches and savage beatings. Murdock and Price, COURTING JUSTICE (2001) at 143, 149-50; Amnesty International, BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION 8 (1997). Relations between police and the gay, lesbian, and

bisexual community are improving. However, even with the best police response, police cannot be everywhere.

The Second Amendment was written decades before the creation of the first professional uniformed police services in London in 1829 and in New York in 1844. *See* Lardner & Reppetto, NYPD: A CITY AND ITS POLICE (2000). It was written when Americans had to depend upon themselves and their neighbors for defense against burglars, robbers, highwaymen, and Indian raids. Had the drafters anticipated modern police forces, they might well have been as concerned about their potential for tyranny and oppression as they were about oppression by a standing army. Setting that potential aside, even the most well-funded and dedicated police department cannot be everywhere to defend every person threatened by a hate crime. Nor would Americans wish to give up the level of personal privacy necessary to allow police to do so were it technically feasible. The Second Amendment is as important for individual self-defense as it is for national defense. The prospective targets of hate groups need the individual protection of the Second Amendment to protect themselves from would-be attackers and killers.

A firearm, lawfully carried and used in self-defense, can effectively deter an attack. It may save the lives of Pink Pistols members. Pink Pistols urges this Court to review and reverse a holding which could disarm its members and the public at large.

2. *If the Constitutional Right to Keep and Bear Arms is Limited to a State-Created and State-Organized Military Force, then Pink Pistols Members can Lawfully be Deprived of a Legal Right to Carry a Firearm Because those who Engage in Homosexual Acts are Excluded from Military Service.*

Southern states once used restrictions on firearms ownership to deny black Americans the ability to enforce

their rights and protect themselves from hate groups such as the Ku Klux Klan. *See* Cottrol & Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 344-345 (1991). Similar restrictions might be imposed on GLBT persons under the rubric of homosexuality as a mental illness or character flaw.

Although the American Psychiatric Association no longer considers homosexuality a mental illness, misconceptions about homosexuality as a mental illness might still be used to deny firearms permits to GLBT persons, just as the Immigration and Naturalization Service once tried to deport homosexual immigrants as "persons afflicted with psychopathic personalities." *See Boutilier v. Immigration Service*, 387 U.S. 118, 120-23 (1967); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

Until recently, security clearances were routinely denied to gay men and lesbians. *See e.g. Adams v. Laird*, 420 F.2d 230, 239 (D.C. App. 1969). A 1995 Executive Order stated that security clearances could no longer be denied solely on the basis of homosexuality. Exec. Order No. 12968, 3 C.F.R. 391, 397 (1996). That order could be rescinded by a similar order.

Following *Lawrence v. Texas*, __ U.S __ (2003), states may not be able to legally deny firearms permits to GLBT persons based on violations of sodomy laws. Some states may continue to use more vague "moral turpitude" status to restrict firearms ownership. *See* Utah Code Ann. § 53-5-704(1)(e) (permit allowed if applicant "has not been convicted of any crimes involving moral turpitude"). It is unclear how *Lawrence v. Texas* will affect moral turpitude clauses.

3. *Under Discretionary Licensing Laws, Pink Pistols Members Could be Denied The Right to Carry Because of their Status.*

Silveira allows states to indirectly prohibit GLBT persons from firearms ownership through laws limiting permits to persons of "good moral character" [4] or to to "suitable persons".[5] Similar laws and cases regarding the character of applicants to state bars [6] and teachers [7] have been used to discriminate against GLBT persons.

If the Second Amendment protects an individual right to own and carry a firearm, then permit restrictions and denials could be challenged as a violation of that right, separate and apart from evolving equal protection standards. The result may be more akin to this Court's holdings concerning the First Amendment rights of gay and lesbian publications than to cases upholding the military's ban on gay men and lesbian servicemembers.

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[4] *See e.g.* CAL. PENAL CODE § 12050 (a)(1)(A); DEL. CODE ANN. tit. 11, § 1441(a); N.J. REV. STAT. § 2C:58-3(c); N.Y. PENAL §400(1)(b). *See also* UTAH CODE ANN. § 53-5-704(1)(e).

[5] *See e.g.* CONN. GEN. STAT. § 29-28(b); MASS. GEN. LAWS ch. 140 § 131(d); R.I. GEN. LAWS § 11-47-11(a).

[6] Compare *In re Florida Board of Bar Examiners*, 403 So.2d 1315 (Fla. App. 1981); *In Re Kimball*, 333 N.Y.2d 586, 347 N.Y.S.2d 453, 301 N.E.2d 430 (1973).

[7] *See e.g. Oklahoma City Board of Education v. National Gay Task Force*, 729 F.2d 1270 (10th Cir. 1984), *cert. denied*, 470 US 903 (1985).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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